

CHAPTER TWO

GENERAL CONTRACT PRINCIPLES

Introduction

In this chapter, you will learn the basic common legal requirements for contract formation. As you will see in subsequent chapters, government contract formation is based on these long-standing common law rules. However, federal statutes and regulations have modified these procedures in significant ways. At the end of this chapter, the principal distinctions between government and private-sector contract formation will be discussed.

On-Line Component

You are required to read this Chapter before coming to class. You may already be familiar with much of this material if you have taken business or business law classes. The key elements of this Chapter will be reviewed in class. You should prepare for the resident portion of the class by answering the questions at the end of the Chapter and mastering the terms and concepts set forth at the end of the Chapter.

Terminal Learning Objective: Compare historical acquisition processes and demonstrate changes in how the Government acquires goods and services.



Enabling Learning Objective 1: *Private versus Government-unique Practices*
Provide examples; distinguish between private standards for purchasing goods and traditional rules of Government contract formation and administration.

I. WHAT IS A CONTRACT ?

"An honest man's word is as good as his bond."

Don Quixote

Miguel de Cervantes Saavedra

Introduction. Promises come in all shapes and sorts and bear on almost every aspect of human endeavor. However, even in an age touched by cynicism, the trait of keeping one's word is still valued highly. A complex society necessarily requires people to rely upon each other and part of that is having confidence that a promise will be kept. In a complex economy, the importance of keeping a promise is heightened, in that failure of one party to keep his or her promise can harm the other party. The basic purpose of

contract law is to identify those promises which will be enforceable in a court of law and distinguish them from those promises which a court will not enforce.



A contract is a promise or set of promises the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Definition of a contract. The legal definition of a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. A contract spells out the duties and responsibilities of each party in the contract. If one of the parties fails to uphold their responsibility or fails to perform their duty, the law will step in and provide to the party that is harmed a remedy. The definition of a contract recognizes the duty of both parties and thus, the court will fashion an appropriate remedy for the failure. Contracts may consist of a single promise by one person to another or it may involve any number of persons and any number of promises.

Legally, there is a difference between a contract and an agreement. "Agreement" is a broader term since it encompasses both those promises that the law will enforce and those that the law will not enforce. (*It is noteworthy that the FAR governs contracts but does not apply to agreements such as Cooperative Research Agreements and various Federal grants.*) This difference illustrates the point that a contract is strictly a legal concept and that the kinds of promises that are enforceable through the legal system are those that the system deems of sufficient social or economic importance to warrant enforcement.

II. CONTRACT FORMATION – THE SIX BASIC CONTRACT ELEMENTS



A. OVERVIEW

1. Elements of Contract Formation. To form a legally binding contract, six basic elements of contract formation must be satisfied. The parties to the contract must have capacity to contract; both parties must state the mutual assent to be bound to the contract terms; both parties must give consideration; the contract must have a lawful purpose; the terms of the contract must be reasonably certain and clear; and the contract must be in a form permitted by law. This chapter explores these six elements.

2. Contract Formation is Objectively Viewed. In order for our legal system to enforce agreements as contracts, certain essential elements must be present. There must be at least two persons, each of whom has legal capacity to act. The parties to the contract must, by offer and acceptance, manifest assent to the terms of the contract. The phrase "manifest assent" is used rather than the word "agree" because contract formation is essentially an objective process; the parties are judged not by what subjective intention might underlie their words and actions, but by how the words and actions themselves would be objectively understood by a reasonable person. Use of this objective standard to determine assent prevents an unscrupulous party from backing out of a contract by alleging he really did not intend to enter into a binding contract. Through the use of an objective standard, the parties are held to have intended that which a reasonable person would interpret their statements or actions to mean. For example, a contractor signs a Government contract, but later claims he did not understand or accept all the FAR clauses. To determine whether the parties had manifested their intent to be bound by the contract, it does not matter that the contractor did not in fact understand the terms. Under the objective standard, a reasonable person would read the proposed terms and ensure he or she understood the terms before consenting to the contract. Therefore, the contractor is probably bound by the FAR provisions, so long as a reasonable person would understand the language in the FAR provision.

3. State law usually governs contracts between private parties. Historically, the law that applies to private or commercial contracts has been determined by each state for contracts formed or performed within its boundaries. Consequently the law varied slightly from one state to the next. In order to establish greater consistency in contract law and related matters as the nation grew and interstate transactions increased, a "Uniform Commercial Code" (UCC) was developed beginning in 1945; after various debates and modifications, it was adopted by 49 states (all but Louisiana) by 1962. The UCC is state law, not Federal law, and there are still small differences from one state to the next.

B. CAPACITY

1. **Summary.** In order to be legally bound to a contract, a party must have the *capacity* to understand and appreciate the terms of the contract. Remember that the process of contract formation is *objectively viewed*. Therefore, objectively, would a reasonable person expect a mentally incompetent person or a small child to be capable of appreciating and truly understanding a contractual promise and obligation? Legal incapacity and legal incompetence are the legal doctrines employed to protect parties who lack the ability or may not have the ability to understand the terms of an agreement. For the most part, a contract entered into by a person lacking legal capacity is *voidable*. It is enforceable only at the option of the party the law seeks to protect. In contrast, a void contract is not enforceable at all, because in the eyes of the law it never existed. The intention of the legal system is to protect certain classes of persons against their own unwise acts, while at the same time to allow members of that class to enforce contracts that will benefit them. Under this theory the contract is enforceable against the party who is not to be protected by the incapacity rule. Legal incapacity may arise from infancy, insanity, drunkenness, and contractual incapacity on the part of corporations.

2. **Infants.** In general, the contracts of infants (historically defined to be persons under eighteen years of age) are *voidable at their option*. In most cases the infant need not do any affirmative act in order to derive the benefit of the rule of voidability. An infant may avoid his obligations under an executory (i.e., unperformed) contract by merely doing nothing. In order to bind himself in a contract entered during infancy, the infant must ratify the contract upon reaching majority. Ratification is any act that indicates that the infant intends to be bound by his promise. Such ratification can be expressed, orally or in writing, or implied. Ratification by implication occurs where the infant, after reaching majority, performs the contract (or begins performance), e.g., an infant obligated to repay a loan makes an installment payment after reaching majority.

Where the contract has been performed or partially performed by the infant, he or she must take some affirmative action in order to avoid obligation under the contract. This is referred to as disaffirmance. The result will be to have the contract rescinded, and as in any case of rescission, each party must return any consideration received from the other party. Therefore, when an infant disaffirms a contract any consideration received must be returned in order for the infant to receive the consideration given to the adult party. An interesting question arises when the infant cannot return the consideration because it has been squandered. The majority of states hold that the infant is still entitled to the return of the consideration.

There is one major exception in which an infant may be held liable for consideration given under a contract; if the consideration is for "necessaries" (items necessary for the health and welfare of the infant) and the infant has consumed them, the infant will be liable for the reasonable value of the necessities. This liability arises out of the theory of "quasi-contract," which is discussed later.

3. Mental Incapacity. The law concerning insane persons relative to voidability is much the same as it is for infants. One important difference involves the distinction between nondeclared and adjudicated insanity. Where a party to a contract has, prior to the contract formation, been legally adjudged insane, their contracts are absolutely void. Where a party to a contract has not been legally declared insane before entering the contract, the contract is voidable only if the insanity existed at the time that the contract was formed. If the party was lucid at the precise moment of contract formation, the contract is not voidable.

4. Drunkenness. A contract made by a person while drunk, so that they are incapable of understanding the effect and nature of it, is voidable at the individual's option. The rules applicable to infancy with respect to affirmance, ratification and disaffirmance are generally applicable to contracts of drunken persons, once they are sober.

5. Corporations. The corporation or joint venture as party to a contract presents, on occasion, a special case. Generally, a corporation has implicit power to enter a contract, insofar as the contract relates to the accomplishment of the corporation's stated purpose. However, where a corporation enters a contract that does not advance the stated purpose, or is not within the corporation's powers as granted by the charter of incorporation it receives from the state, the contract is said to be *ultra vires*. While there is some differences of opinion as to the effect of an ultra vires contract, all states agree that where the contract has been fully performed on both sides, neither party to the contract may disaffirm it. Where the contract is wholly executory (i.e., unperformed), all states agree that neither party may enforce it. However, where there has been partial performance on each side, or where one side has performed, the majority of courts treat the contract as if the corporation did in fact have the authority to enter the contract. A small minority of states would allow a recovery only on the basis of quasi-contract.

C. MUTUAL ASSENT

Parties “mutually assent” to a contract when an offer is accepted under circumstances that objectively demonstrate a meeting of the minds.

1. OFFER

a. Introduction. A contract is formed by acceptance of an offer. An offer is a proposal by a person (the “offeror”) to enter into a contract. The person receiving the offer is called the “offeree”. When the offeree intends to accept the offer and communicates this acceptance to the offeror, a contract is formed. As simple as these basic building blocks of contract formation may appear, the question of whether a contract has been formed can be complex. Indeed, the more complex the proposed agreement, the greater the chance that a contract has not been effectively formed or, if there is an agreement, that the agreement may in some way be flawed or imperfect. Many issues may arise.

b. Advertisements Distinguished. First, there is often a question as to what is an offer or exactly what is required for to accept to be effective. One of the most frequent problems arising in this area concerns the distinction between an offer and an advertisement. Advertisements are generally construed as invitations for offers, primarily because the language of the advertisement does not indicate a present contractual intention on the part of the one advertising. Thus, where published notices state that competitive bids will be received for a particular construction project or for the supply of materials, the submission of a bid in response to the request merely constitutes an offer and not an acceptance of an offer.

c. Who may accept an offer? Only the intended offeree can accept an offer. In many cases this means that there is one and only one specific offeree in whom the power of acceptance is vested. Acceptance by anyone other than the intended offeree does not form a contract. Of course, it is possible for the offeror to make the offer to more than one person; he may direct it to a class of persons or to the public generally, intending that any member of the class or public have the power to accept. For example, reward notices for the apprehension of known criminals are posted or circulated and the intention of the offeror (the one promising to pay the reward) is that all members of the public are offerees and can accept by meeting the terms of the offer. Of course, under most circumstances there can be only one acceptance, but the number of potential offerees is unlimited. In most situations, however, the offer is made to a specific offeree and no one else may accept the offer.

d. Uncommunicated Offers. An offer must be communicated to the offeree before the offer can be accepted. An uncommunicated offer is not an offer at all. Furthermore, an offer communicated to a particular offeree cannot be accepted by another person who was not intended to be an offeree. Thus, merely learning that an offer might be forthcoming will not give one the opportunity to accept. Only when the offer is actually communicated - - even if that communication is made through a 3rd party (an “agent” of the offeror) may the offer be accepted and a contract formed.

e. Expiration of Offers. An offer continues to exist (and therefore may be accepted) until it expires. An offer may expire because there is a time limitation stated in the offer itself. If no such time is stated, the offer will expire after a reasonable time has passed. The question of what is a reasonable time will hinge on the nature of the offer itself. When the stated time (or a reasonable time, if no time is stated) has elapsed, the offeree's power of acceptance terminates. Unless the offeror makes a new offer, there can be no contract formation. The clearest case is where the offer itself contains a time limit. The offeree must accept within the specified time, and it is no excuse that circumstances beyond the control of the offeree caused the delay. Frequently, the time stated in the offer is not fixed as to a specific calendar day, but rather is based on the happening or the non-happening of a condition. Thus a statement in the offer that the offer will remain open as long as the offeree remains in possession and control of a specific item would extend the duration of the offer until the offeree no longer has such possession or control. If the offeror

does not express a definite time period for the duration of the offer, the offer remains open for a reasonable time. What is reasonable usually depends upon the nature of the contract proposed, the usage of business, and other circumstances in or surrounding the particular situation. Certain offers by the very nature of the subject matter involved are implicitly intended to expire within a relatively short time period. Thus, where the offer is for the sale of corporate stock, futures, or other subject matter that have frequently fluctuating prices, a reasonable time may be defined in hours or days. On the other hand, certain types of subject matter that have rather constant price structures, may remain available over an extended period of time. In these cases a reasonable time may be defined in terms of weeks or months. A “reasonable time” is a question of fact to be decided on a case-by-case basis and according to what the offeror must have reasonably intended under all the surrounding circumstances.

f. Revocation of Offers. It is important to keep in mind that an offer for a proposed contract is under the absolute control of the offeror, at least initially. In general, an offeror may designate the time that the offer is to remain open; the place where the acceptance is to be communicated; the manner in which the offer may be accepted; and any conditions that the offeror wants to impose. In addition, an offeror can recall the offer at any time before the acceptance has become effective. This power of recall is virtually absolute, unless one of the limited exceptions discussed below applies (such as where an option has been paid for by the offeree). An offeror may revoke his or her offer *anytime* before it is accepted by the offeree. When this occurs, the offeree loses the power to accept the offer. In order to be effective, the revocation must be *communicated* by the offeror to the offeree. However, if the notice of revocation is not received by the offeree because of the fault of the offeree or his or her agent, then the revocation is effective even though the offeree does not have actual knowledge of it.

g. Additional Ways an Offer May be Revoked or Terminated. In many situations, revocation may be implied by the circumstances. For example, where an offer is for the sale of a specific item and the offeree receives reliable information that the item has been lost or destroyed or sold to another before acceptance of the offer, the offer is implicitly revoked. The theory is that the offeree could not rationally believe that the offeror still wants to sell an item that either no longer exists or that the offeror no longer has available for sale. Often cases arise in which there is a question as to the definition of “reliable information,” particularly where the information proves to be false. (The fact that the information was false does not necessarily mean that the information was “unreliable”).

Circumstances beyond the control of either the offeror or the offeree may occur which have the effect of terminating the offer. Death of either the offeror or the offeree prevents contract formation. The principle involved is that one cannot contract with a dead person. Thus, where the offeror dies, there cannot be any presumption of a continuing intention to be bound to a contract. Similarly, where the offeree dies there cannot be a valid acceptance, because offers are personal to specific offerees and cannot ordinarily be accepted by others. An exception is recognized in those situations where the offer is an irrevocable one (e.g., an option). The legal theory is that the offeror by binding himself or herself by contract

to keep an offer open for a stated time has knowingly and willingly relinquished the right to revoke, and that the individual's continued existence is therefore not vital to contract formation. But this is true only in those cases where the proposed contract does not require the personal services of the offeror or the offeree. In those cases where the offeree dies before accepting, there cannot in any case be a valid acceptance.

Where a law is enacted which declares the subject matter of the contract to be illegal, it is said that the offer is terminated as a matter of public policy. This termination will occur whether the performance of the offeror or the offeree is declared to be illegal or against some rule involving public policy

h. Rejection of an Offer. The rejection of the offer by an offeree terminates the offer. A rejection may be manifested in several ways. The method that is the most unequivocal is express rejection. When an intended offeree communicates to the offeror that he or she does not want to accept the proposal, the offer is terminated. As in the case of the revocation of an offer, a rejection must be communicated to the offeror in order to become effective. Once rejected, the offer is legally dead and may no longer be accepted; to form a contract, a new offer is necessary.

i. Making an Offer Irrevocable.

A promise not to revoke is, in a sense, a separate contract that preserves an offeree's right to accept an offer. In the typical case, an offeror makes an offer and promises that it will remain open for a stipulated period of time. To insure that the offeror will keep the offer open, the offeree gives to the offeror some consideration with the intention that this exchange will bind the offeror to keep the time promise. This contract involves (1) one party's promise to keep an offer open and (2) the other party's payment or promise of payment of consideration; thus the offeror is being paid to keep the offer open for the stated amount of time. Consideration is necessary to prevent the offeror from revoking the offer, because, in the absence of such a payment, the offeror may with impunity revoke the offer at any time prior to its acceptance. Unless supported by consideration, any promise not to revoke is merely a promise. The rationale for allowing an offeror to revoke the offer in the absence of consideration is that a person is generally not held for bare, unsupported promise. But there are two notable exceptions to this rule. One is the "firm offer" rule of UCC §2-205: if a written offer by a "merchant" (as defined at UCC §2-104) assures the offeree that it will be held open, it is not revocable within the time stated in the written offer (or a reasonable time, if no time is specified) even though the merchant receives no consideration; the maximum time is three months.

The second exception is when the offeror requests as consideration a return act rather than a return promise (called an offer for a "unilateral contract") and the offeree actually begins performance of the requested act. It would be unfair to allow the offeror to revoke the offer; commencement of performance of the requested act prevents revocation of the offer unless a reasonable time passes without performance being completed. For example, if a party states: "I will pay \$100.00 to someone to paint this room" and someone begins painting it, the offeror cannot now withdraw the offer since performance has begun.

j. Counter-Offers

Another method by which the offeree rejects the offer is by making a counter-offer. One form of counter-offer is to accept an offer, but with a material term changed or altered. The offeree may state "I accept your offer except that I am unwilling to pay the price stipulated; instead I accept at ... price." Alternatively, the offeree may make a counter-proposal: "I am willing to contract with you but instead of your terms I propose the following terms...." In either of these examples the communication by the offeree constitutes a counter-offer. The effect of a counter-offer is two-fold. First, the original offer is effectively terminated as if by an express rejection. Second, the counter-offer itself becomes an offer. The result is that there is an offer outstanding between the original parties, except that their positions are reversed; that is, the original offeror now becomes the offeree of the counter-offer, and the original offeree becomes the offeror of the counter-offer. Occasionally, however, a counter-offer will not constitute a rejection of the original offer. This happens where either the offeree makes it clear in the counter-offer that they are not rejecting the original offer but merely bargaining for different terms, or where the original offer itself leaves some room for negotiation. The instances in which counter-offers do not reject the original offer are very few indeed.

2. ACCEPTANCE

a. **Introduction.** Most offers can be accepted only by or on behalf of the designated offeree. As explained before, the offeror generally has the absolute right to choose the person with whom he or she wants to enter a contract. Subject to the ordinary rules concerning the legal relationship of principal-agent, someone other than the offeree can accept the offer for the benefit of the offeree, provided that the offeror has not stipulated to the contrary. The acceptance by the offeree must be unequivocal. The reason is that the offeror must know what the state of the offer is, and must not be put in a position of uncertainty by a communication from the offeree that is ambiguous. Therefore, a conditional acceptance (where the offeree accepts subject to the offeror doing something more than promised in the offer) or a communication that hedges, procrastinates, or leaves the offeror in doubt, does not constitute a binding acceptance.

b. **Communicating Acceptance.** Generally, an acceptance must be communicated in order to become effective and bind the parties in contract. In bilateral contracts, it is usually necessary for the offeree to communicate acceptance to the offeror. Rarely will the requirement for communication of acceptance be waived by an express provision of the offer or by implication from past dealings.

At common law, the time, manner, form, and other conditions relating to communication of the acceptance are within the absolute control of the offeror. If the time, place and means of communication are specified by the offeror, no other time, place or means will constitute an acceptance. In this regard, it would be important to distinguish between a form of acceptance required by the offeror as opposed to a mere suggestion by

the offer that a certain form of acceptance is desirable. In the latter case the acceptance could be effective even though the offeree ignored the suggestions of the offeror.

c. When is Acceptance Effective? Published cases are replete with situations in which the question of whether a contract was formed hinged on the timing of a communication. Was a contract formed when the acceptance was mailed before the offeree received a revocation? Was a contract formed when the offeree mailed the letter, even though the letter was lost in the mail? Was a contract formed when the offeree mailed an acceptance but then changed their mind and telegraphed a rejection that reached the offeror before the mailed acceptance? Before answers can be given to these questions, it is necessary to establish when an acceptance becomes effective.

Although both a revocation and a rejection are effective only when received, this is not true of acceptance. It is a general rule that an acceptance is effective as soon as the offeree dispatches it if the means used to communicate the acceptance is one authorized by the offeror. Since the offeror has the absolute power and right to determine how the acceptance must be communicated, he or she is deemed to guarantee that the communication will be handled properly; in effect, the agency used for communication becomes the legal agent of the offeror. Under the familiar theory that notice to the agent serves as notice to the principal, communication of the acceptance becomes effective and binding when the offeree gives the acceptance to the agency for communication. But there is a distinction between so-called "authorized" and "unauthorized" means of communication. If the offeree uses an authorized means of communication, then the acceptance is effective as soon as dispatched by the offeree. This is sometimes referred to as the "mailbox rule": since mailing the acceptance is usually an authorized means of communicating it, an acceptance is usually effective when it is placed in the mailbox. If an unauthorized means of communication is used, then the acceptance is effective, if at all, only when received by the offeror. It is quite possible for the offeror to designate a means of communication that must be used, so that any other means will be ineffective even if the acceptance is actually received. In most cases, however, the offer is not so restrictive and any means of communication used by the offeree will be effective; yet the time of its effect will depend on whether or not the means was authorized.

An attempted acceptance after the time for acceptance as stipulated in the offer (or after the lapse of a reasonable time) is merely a counter-offer that in turn may be accepted or terminated in the usual manner.

Acceptance of an offer comes about by the offeree expressing in so many words that he or she accepts the proposal put forth by the offeror. But this is not an exclusive method of accepting an offer. On some occasions the offeree's conduct will result in an acceptance being implied. For example, receipt and retention of goods or property by the offeree may result in the implication that the offeree accepts the goods or property and the contract of which their shipment was a part. Similarly, performing an act that is inconsistent with a theory that the offeree does not intend to be bound by a contract (such as exercising

physical control over property or selling it to another) may imply acceptance of an offer concerning the property.

In addition to affirmative conduct on the part of the offeree, inaction may constitute an acceptance. From past dealings, custom of the trade or other standards that bind the parties to particular conduct, silence on the part of the offeree may result in acceptance. The general rule, that silence alone is not acceptance, is universally followed. But silence coupled with something else, such as past dealings, or the circumstances surrounding the particular offer, may constitute acceptance. The formation of contracts through silent acceptance is rare.

3. MEETING OF THE MINDS

a. Introduction. Contract formation requires mutual assent by at least two persons. These parties must “manifest” (declare, demonstrate) this assent in an objective manner. It is sometimes said that contract formation requires a “meeting of the minds”. The parties minds need not “meet” in a subjective sense; the parties need not be clairvoyant. Mutual assent will be objectively assessed: How would a reasonable person interpret the words and or conduct that were exchanged by the parties? If the contract is in writing, the issue becomes how should the language of the contract be read? If the contract language is clear and yields only one reasonable interpretation, one party’s subjective misunderstanding of the language is not relevant. A party’s subjective understanding only becomes relevant if the offer is ambiguous. (Interpretation of contract language will be explored in some detail in a later chapter.)

If two parties sign a contract but each knows (or has reason to know) that the other party has a very different understanding as to what is being bought and sold, is a contract formed? See the case of A.B. DICK at Vol. 2.

b. Mistake. Situations involving mistake are categorized as involving either a unilateral mistake or a mutual mistake. A unilateral mistake occurs where one party misunderstands either a term of the contract or some essential fact concerning the basis of the contract; a mutual mistake occurs where the parties share an erroneous belief concerning the basis for the contract. Whether the mistake was unilateral or mutual can determine whether an enforceable contract exists. If as a result of a mistake the contract as written does not reflect the terms actually agreed to by the parties, the contract can generally be “reformed” if it can be established what the actual agreement was.

As noted above, the generalization that a contract can exist only if there has been an actual “meeting of the minds” is not entirely accurate. For example, if one party misreads the contract document before signing, the misunderstanding means that there was no “meeting of the minds” but does not usually provide a basis upon which the contract will be changed or “reformed.” The general rule is that a unilateral mistake is not a basis for reformation of a contract or for excusing the mistaken party’s failure to perform. However,

there is an important exception: where one party knows (or should realize) that the other party is entering the contract on the basis of a mistake, the courts will often allow reformation of the contract in order to avoid unfairness. For this same reason, the contracting officer has a duty to verify an offeror's bid if there appears to be a mistake.

As explained by the Court of Claims:

What we are really concerned with is the overreaching of a contractor by a contracting officer when the latter has the knowledge, actual or imputed as something he ought to know, that the bid is based on or embodies a disastrous mistake, and accepts the bid in the face of that knowledge.

Ruggiero v. U.S., 420 F.2d 709, 713 (Ct. Cl. 1970).

The court further explained that in order to reform the contract on the grounds that the Government "should have known" of the contractor's unilateral mistake, the error must have been a "clear cut clerical or arithmetic error, or misreading of the specifications." *Id.*

c. Mutual Mistake. The situation is very different where the parties to a contract discover that they have made a mutual mistake as to the basis for the contract. In order for a court to find the existence of a mutual mistake, the parties must have been mistaken as to the same essential fact. If the parties each made a mistake but the mistakes were different, the courts will treat the mistakes as concurrent unilateral mistakes rather than a mutual mistake, and not allow reformation. For example, in 1981 the General Services Administration awarded a contract to replace the roof on a federal office building. The contractor later sought reformation of the contract to increase the price, contending that a mutual mistake had been made in estimating the cost of the work. The contractor's mistake was in omitting labor costs from his calculation; GSA had not omitted the labor cost from its calculation, but had underestimated the cost of certain materials. The court held that although both parties' estimates were mistaken as to the total cost, "these separate errors do not constitute a mutual mistake that would allow contract reformation." The court explained that the contractor and the Government "did not enter into the contract based on commonly mistaken beliefs. ... "This is not a case where two parties, both thinking a cow barren when in fact she was not barren, agreed to the sale of that cow." *Bromley Contracting Co., Inc. v. U.S.*, 794 F.2d 669 (CAFC 1986).

<p>Can misrepresentation by the Government during contract negotiation give rise to a "mutual mistake"? See <i>Appeals of JIM SENA CONSTRUCTION COMPANY, Inc.</i> at Vol. 2.</p>

d. Unusual Circumstances Excusing Contract Performance. In addition to mutual mistake, there are several other situations that can challenge the reality of consent, thereby preventing the enforcement of a contract. Under duress, the threat of physical force or harm which induces another to enter into a contract, renders the agreement void.

The threat of economic or social coercion inducing another to enter a contract renders the contract voidable, at the option of the party having been coerced. Generally, threatening to do that which one has the legal right to do is not economic duress. The undue influence defense stems from some types of confidential relationship, such as parent and child, or attorney and client, where, by virtue of the relationship, one party cannot be said to have freely assented to the contract. In this situation, the contract is voidable at the option of that party. Fraud in the execution (or procurement) can involve a situation where one party does not even know he or she is entering a contract and has no intent to enter into an agreement. Any resulting agreement is void. Fraud in the inducement involves a party who understands he or she is entering into a contract, but does so based upon the other party's fraud. The elements of fraud are: (1) one party makes a false representation; (2) of a material fact; (3) knowing the representation to be false and intending to deceive the other party; and (4) the other party is justified in relying on that representation. Misrepresentation contains all the elements of fraud except that there is no intent to deceive; the representation may be honest but incorrect or it may be negligent. In either event the contract is voidable.

*How abusive must conduct be in order to constitute "duress"? Can the Government be guilty of duress? See the case of **SYSTEMS TECHNOLOGY ASSOCIATES, INC., v. U.S.** at Vol. 2.*

D. CONSIDERATION

Contracts are based on bargain and exchange. Each party receives something of value and gives something of value. "Consideration" is the name given to that "value" given by each party. Actually, many things may constitute consideration: an act, a promise, a forbearance, or the creation, modification or destruction of a legal relation. (Restatement of Contracts, Section 75.) In a bilateral contract each party exchanges a promise for a promise. For example, if the Government hires a contractor to build an airplane, the contractor promises to build the plane and the Government promises to pay money. Each promise is the consideration for the other. By contrast, in a unilateral contract one party gives a promise as consideration, and the other party performs without making a promise. The offeree "accepts" by completing performance. The classic example is an offer to pay \$500 to whoever captures a named outlaw, "dead or alive." Here, the offeror is not asking anyone to *promise* to capture the outlaw, but rather *to accomplish the task of capturing the outlaw*. A contract is formed if the task is accomplished.

1. Adequacy of Consideration. The law distinguishes between sufficiency and adequacy of consideration. "Adequacy" of consideration refers to the weight or substantiality of the act or promise given in exchange (e.g., whether the amount being paid is an appropriate value). Because of the difficulty in determining the actual worth of a promise or an act, the law will generally not delve into the adequacy of the consideration. In contrast, the term "sufficiency" means that consideration must have value in the eyes of the law, i.e., that it is legally "valid." "Sufficiency" is frequently defined in a negative sense:

every consideration is sufficient except that which is against public policy. An obvious example of an insufficient consideration would be a promise to commit a crime.

Historically, the test of sufficiency has involved the concepts of benefit and detriment. It is said that in order for a promise to be binding, the promisor must receive in return a legally sufficient consideration and the return consideration must be legally detrimental to the one who gives it. A promise to do something that the promisor is not otherwise legally bound to do, or a promise not to do something that the promisor has a legal right to do, constitutes a "detriment." In most cases the detriment incurred as consideration is of benefit to the other party, but this is not always true. For example, if one person promises to pay another \$100 if the other person promises to give up smoking cigarettes, the promise to give up smoking is a detriment to the promisor because he is giving up something that he has a legal right to do. It may not be a benefit to the one who extracted the promise, but it is not necessary that such benefit exist. It is enough that the one promising to give up smoking suffers a detriment. On the other hand, mere benefit without detriment is not sufficient consideration. So where Able agrees not to murder Baker, it can hardly be denied that Baker has received a benefit. However, such a promise is not sufficient consideration because Able does not suffer a legal detriment; he is promising not to do something that he does not have a legal right to do anyway. There are several instances where a promise to do something or not to do something is deemed not to be detrimental. Where one promises to do something and lacks legal capacity to bind himself to a contract (insanity, or perhaps infancy, in a state where these contracts are void rather than voidable), the promise is not detrimental. Where one who promises to do something is already legally bound to do that act, or where a promise is illusory in the sense that it really promises nothing meaningful (e.g., a promise to buy all of a product that the promisor may later choose to buy), there is no detriment. The same can be said of a promise to do an illegal act.

If a Government contract to clean up hazardous waste calls for the contractor to obtain the necessary license within one year after contract award, and the contractor cannot perform without the license, is the contract (and the consideration to be received by the Government) illusory? See ENVIROCARE OF UTAH, INC. v. U.S. at Vol. 2.

2. Mutuality Of Obligation. Another important concept is that of mutuality of obligation, meaning that *both* parties must be bound by the contract or neither is bound. If consideration given by one party to another is legally insufficient, the party receiving the legally insufficient consideration is not obligated. For example, Able promises to do something that he is already bound to do (finish constructing a building according to an existing agreement) and this promise is given in exchange for Baker's promise (to pay additional money for the completion of work). Since Able would not be suffering a detriment, then Baker is not receiving sufficient consideration in exchange for his promise. For this reason, Baker could not be held to his promise. An interesting line of cases involves the problem of "requirements contracts." Suppose, for instance, that Able promises to buy from Baker all the widgets that he needs or requires in the next year, in

return for Baker's promise that he will not sell to anyone else; this is binding on both parties, because both parties have incurred a detriment: Able has given up his legal right to purchase elsewhere and Baker has given up his legal right to sell elsewhere.

The promise of future performance and the giving up of a right are valid consideration, but past acts or "favors" of contractors for which no present legal obligation exists may not be consideration for present promises by the Government. Thus, a contractor who voluntarily "gave" supplies to the Government could not claim this as consideration for missing the delivery schedule on a later acquired Government contract.

The doctrine of consideration has been criticized from time to time, but the exchange of consideration is the main thing that differentiates a contract from a mere promise.

E. LAWFUL PURPOSE

The right to contract is fundamental but not absolute. It must yield if it conflicts with the public welfare, and reasonable restrictions may be imposed under the police power when required for the public interest. For example, minimum wage laws restrict a person's freedom to contract for a lower wage. In addition to statutory limitations of the right to contract, the courts have the power to declare certain types of contracts void on the grounds that they are contrary to the public policy. "Public policy" is the common sense and conscience of the community extended and applied throughout the state to matters of public morals, health, safety, and welfare. This principle of law is based on the theory that one cannot lawfully do that, which has a tendency to be injurious to the public or against the public good.

As a general rule, a contract that violates a statute is unlawful, thus void and will not be enforced. A statute can expressly declare that a specific type of contract is prohibited, and such a contract is absolutely void. This is true whether the statute is State or Federal.

However, there are some problems in this area. The view once taken was that a contract was void if made in violation of a statute that imposed a penalty. The modern trend seems to be to consider whether the legislature intended the statute for the protection of the public or merely provided a penalty for the purpose of raising revenue. If raising revenue was the intention, then the contract is not void and as a result is not illegal. Contracts entered into which violate public protection statutes such as those prohibiting gambling, the taking of usury, restrictions on labor, business, etc., on Sunday, laws dealing with trafficking in intoxicating liquor, are void. Similarly, Federal statutes can prohibit certain types of contract actions, such as contracts that make the contractor's payment as a percentage of the cost incurred by the contractor (i.e., cost plus a percentage of cost contracts).

Contracts that bring about results that the law seeks to prevent are said to be unenforceable as "against public policy." Generally, actual injury or damage need not be shown since it is the tendency to prejudice the public good that is being prohibited. The following list is not exhaustive but merely illustrative of those types of contracts which are deemed to be against the public interest: (1). agreements to unreasonably restrain trade or business (reasonable restraints, such as a promise not to engage in business for a short time and in a small area, are not against public policy and are therefore enforceable); (2). agreements for the sale of, or traffic in, a public office (as where I contract with you for a price to use my political influence to get you appointed to a public office); (3). agreements by public officers to accept greater pay than is fixed by law for the performance of official duties (where I offer a public official money to do something that he or she already is required to do - here the danger is that the official may not want to do their job in the future unless they get extra pay); (4). agreements to procure Government contracts by personal or political influence or corrupt means (here, the general rule is that if the fee is contingent upon receiving a contract, it might appear that corrupt means or duress will be used to obtain the contract, and this is against the public interest); or (5). agreements by or between public or quasi public corporations which interfere with their public duty (e.g., where two railroads might contract to do something in unison which might adversely affect their service to the public).

The law will not aid either party to an illegal contract. If the contract is executory (unperformed), neither party may enforce it. If the contract is executed (performed), a court will not permit rescission and recovery of what was given in performance. Where an agreement is illegal only in part, the part that is lawful may be enforced, provided that it can be separated from the part that is illegal. If any part of the consideration that is given for a single promise is illegal and there is no possibility of separation, there can be no enforcement. If several considerations, one of which is bad, are given for several promises, and the legal consideration is by its terms apportioned to the legal promise, the legal part is enforceable. If two promises, one lawful and one unlawful, are given for a legal consideration, the lawful promise is enforceable.

There are some exceptions to this "hands-off" doctrine in which the court "leaves the parties where it finds them." Where a party to the contract is a member of the class of persons for whose protection the contract was made illegal, they may enforce it or obtain restitution. Examples include the following: (1). where a person buys bonds which are illegal because they conflict with Blue Sky laws (laws to protect against tricking people into buying the "blue sky"), the one who buys the bonds is the very one for whose benefit the laws were passed and, therefore, can elect to enforce the contract; (2). an insured under a policy which is illegal because the company did not use an approved form can enforce the insurance policy; (3). where a party to an illegal contract repents and rescinds before any part of the illegal purpose is carried out, he or she may have restitution of the money or goods given in performance; or (4) where one party to the contract is not *in pari delicto* with the other (i.e., is not as guilty) because he or she was induced to enter into the bargain by fraud, duress or strong economic pressure.

F. CERTAINTY OF TERMS

It is essential to the enforceability of a contract that its terms are sufficiently clear to permit the courts to conclude that a contractual agreement was intended. The courts will apply well-established rules of construction to interpret the language used by the parties. Thus, to be fatally uncertain, the contract must be so indefinite as to have no exact meaning.

G. FORM PROVIDED BY LAW

The final legal requirement in contract formation is that the parties express the contract in a form permitted - - or in some cases, required - - by law. In general, a contract can be made in three ways: written, oral, and implied through the conduct of the parties.

1. Statute of Frauds Not all contracts need be in writing. Undoubtedly the vast majority of contracts executed today are oral ones. As you might expect, however, the law requires that certain contracts must be in writing. The majority of these exceptions are based on the so-called "Statute of Frauds", enacted initially by the British Parliament in 1677. The stated purpose was "the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." The Statute of Frauds requires that certain agreements must be in writing and signed by the parties in order to be enforceable at law. These include agreements that involve:

1. promises to answer for the debt of another;
2. promises made upon the consideration of marriage
3. contracts for the sale of lands or any interest in land; and
4. contracts not to be performed within one year of their making.

2. U.C.C. Statute of Frauds. Most states have enacted their own version of the Statute of Frauds. Moreover, the *Uniform Commercial Code* contains a section providing that a contract for the sale of goods for more than \$500 will not be enforceable unless it is embodied in a written contract or memorandum signed by the party to be charged. It is noteworthy that the court might still enforce an oral contract that should have been in writing if the parties have partially performed the agreement.

3. Oral Modifications of Written Contracts. In the vast majority of cases involving large and socially important contracts, the parties reduce their understanding to writing so as to preclude any problems concerning the statute of frauds. In very few cases does one find a statute of frauds problem in large contracts. Probably the most frequent area in which statute of fraud questions arise is where the parties to a written agreement purport to modify it orally. The oral modification is unenforceable if it has not yet been performed. If the oral agreement is performed by one party, the courts may require the other party to perform in accordance with the orally modified terms.

III. CLASSIFICATION OF CONTRACTS

While the preceding sections dealt primarily with the essential elements of a contract, whether all the necessary elements are present may depend on how the contract is “classified,” in terms of the intention of the offeror at the time the offer is extended. The contract may be bilateral or unilateral, express or implied. The different classifications are discussed in the following paragraphs.

A. BILATERAL AND UNILATERAL CONTRACTS

A bilateral contract may result when an offer that asks for a promise in return as the agreed exchange for a promise. In such a contract each party is both a promisor and a promisee. The majority of contracts are of this type. On the other hand, an offer that looks forward to an act as the agreed exchange is an offer to enter a unilateral contract. Of course, in this situation only one party is a promisor, while the other is only a promisee. The promise is conditioned upon performance of the requested act and does not become fully binding until the exact act is performed. In some circumstances it is very difficult to determine just what the offeror wants in return for the promise. In these cases it is presumed that an offer invites the formation of a bilateral contract. The rationale behind this presumption is that if the consideration sought is a return promise, the offeror has somewhat greater protection than if there is no acceptance prior to actual performance. If the offer is for a unilateral contract, the offeree may begin the act but not finish it, in which case the offeror does not receive what was wanted but is bound to keep the offer open for a reasonable time once performance is undertaken.

B. EXPRESS AND IMPLIED CONTRACTS

There are express contracts and two kinds of implied contracts: “implied-in-fact” contracts and “implied-in-law” contracts. The latter are sometimes called *quasi*-contracts. Express and implied-in-fact contracts are both based on actual agreement between the parties. In express contracts, the parties manifest their intention to be bound by the use of oral or written words or by other signs or symbols that have specified meanings. In the implied-in-fact contract; the parties manifest their assent by conduct rather than by such words or other symbols.

In contrast, implied-in-law contracts (*quasi*-contracts) are not based upon any actual agreement or promises, and they do not involve any intention to enter a contract; they are not actual contracts at all. In very general terms, an implied-in-law contract exists where one person has received or used something for which it is proper that they should compensate the other. More specifically, if one person confers a benefit on another, he or she may recover in quasi-contract the reasonable value if it would otherwise be unjust for the recipient to retain or enjoy the benefit. Historically, the amount of recovery has been the worth of this benefit to the person who received it; it is not necessarily the market value for

like things or services (although this may be the price arrived at by the courts in some cases). The modern trend is to consider the cost incurred by the one who confers the benefit. However, if Able expends costly time and money on doing something for Baker under circumstances where the doctrine of quasi-contract is brought into effect, Able may not be able to recover any monetary return if the service performed for Baker was not of any monetary value to Baker. In addition, not all benefits are compensable. One cannot force benefits on another. So, where one person refuses the service and the other performs the service anyway, there will not be any recovery in quasi-contract. The reason for this is that quasi-contract is utilized only where it would be unjust not to compensate the person who performs the service or who transferred title or use of goods.

Generally speaking, there are two important areas in which quasi-contract cases arise. The first involves emergency situations. Where one performs services for another in an emergency, there is a presumption that the services are performed gratuitously. An exception is made when the performer of the services goes to great trouble or expense in performing the service, and this is allowed to override the presumption of gratuity. Another exception is made where the one performing the service is a professional in that particular line of work. In that instance, a presumption arises that the professional is not performing gratuitously, but rather is pursuing his or her profession. The second area in which quasi-contract cases arise is where one has a duty to do something and someone else voluntarily acts for them so that the duty is discharged or satisfied. The one who had the duty is unjustly enriched and can be required to compensate the acting party in quasi-contract. However, in general, the courts lack jurisdiction to hear a claim against the Government under the quasi-contract doctrine.

Where the Government's course of dealing with a contractor has been to accept the goods now and place a formal order later, does the contractor's reliance on that practice create an implied contract? See the case of O'NEILL OIL SERVICES, INC. at Vol. 2.

V. SIMILARITIES AND DIFFERENCES BETWEEN COMMERCIAL AND GOVERNMENT AUTHORITY AND CONTRACTS

A. SOVEREIGNTY OF THE FEDERAL GOVERNMENT

1. **Sovereign Immunity defined.** The most fundamental difference between contracting in the commercial sector and contracting with the Federal Government is that the Government is protected by *sovereign immunity*. The Federal Government *is subject to lawsuits from private parties only if (1) Congress expressly waives sovereign immunity or (2) it operates in a proprietary (non-governmental) capacity*. Historically this doctrine of *sovereign immunity* derives from medieval English common law, which held that the King, who ruled by "divine right," could do no wrong. A practical reason for the doctrine is that a sovereign acting in accordance with its delegated responsibilities must not be harassed by private suits to such an extent that its function is impaired. In a modern context, the government as a whole enjoys similar protection. The United States Supreme Court has said that the Government never gives up its role as the sovereign unless it does so voluntarily, and this can be done only to the extent that the Constitution either expressly or implicitly authorizes.

2. **Contracting.** While at first glance, it may appear that, by entering into a contract with a private party, the government is "stepping down" from its role as sovereign and entering into a proprietary (commercial) relationship, it usually does so only to accomplish a legitimate government purpose (i.e. purchase munitions with which to defend the nation). It could be said that the Government is still the prince even when clothed in commercial rags. But as we shall see, modern Congressional legislation waives sovereign immunity in many areas, including contracting. Under the Tucker Act, the Government permits suits against it that arise out of express or implied-in-fact contracts. These actions may be brought in federal courts.

3. **Federal Law Governs.** Another aspect of sovereignty is the question of which law is to be applied to a contract involving the Government. The famous case of *Erie Railroad Company V. Tompkins*, 304 U.S. 64 (1938), held that in cases in federal courts between private parties, state law rather than federal law will be applicable to the controversy. If the *Erie* doctrine were applied to it, the Government's rights under a contract could vary from state to state. It is highly desirable that the Government's affairs be administered on a uniform basis, and the *Erie* doctrine would not be productive toward this end. Consequently, the case of *Clearfield Trust Company v. United States*, 318 U.S. 363 (1943), held that the *Erie* doctrine does not apply to cases in which the Government is a party, Government contracts are subject to federal law, not state law. The rule of law that governs litigation between private parties and the Government is formulated either by the Congress through appropriate acts or by the federal judiciary through case decisions.

4. Immunity from State Taxation. Finally, the Federal Government and its agencies and property are immune from state and local taxation, under the supremacy clause of the Federal Constitution. This tax immunity was established in the case of *McCulloch v. Maryland*, 4 Wheaton 316 (1819), where Justice John Marshall stated "the power to tax involves the power to destroy." Thus, if the incidence of a state tax falls directly on the government, it is unconstitutional. However, there are situations in which the government might still end up paying a state tax *indirectly*. For example, if a federal employee stays at a commercial hotel while TDY, he or she may pay state and local occupancy and sales taxes. The government will *reimburse* those expenses to the traveler, since it is the traveler who is taxed, not the government. However, if the government contracted directly for space in a hotel, it would be immune from these taxes.

B. LIMITED AUTHORITY OF GOVERNMENT AGENTS

While there are many similarities between commercial and Government contracts, the most striking and critical distinction is the limited authority of government agents. In the context of Government procurement, the principal is the United States Government. All those who act for or in the name of the Government are its agents. *The Government is only bound by the acts of its agents committed within the scope of their agent's authority.* Usually the authority of Government agents is express, such as the authority set forth in a Contracting Officer's warrant, to be exercised in accordance with applicable statutes and regulations. Where the actions or statements of a Government agent are not in conformity with an applicable statute or regulation, it is generally outside the agent's actual authority and is not binding on the Government. This may have harsh consequences where a private contractor has relied on an official's unauthorized actions and suffers an injury. However, private contractors and other parties are presumed to know the law. "Men must turn square corners when they deal with the government," stated the Supreme Court in *Rock Island Arkansas & Louisiana R. Co v. United States*, 254 U.S. 141, 143. Justice Felix Frankfurter later commented that this view "does not reflect a callous outlook. It merely expresses the duty... to observe the conditions defined by Congress for charging the public treasury." *Fed. Crop Ins Corp. v. Merrill*, 323 U.S. 380 (1947). All statutes and regulations are required by law to be published, and publication gives the public "constructive notice" of their contents. Even though a party dealing with the Government does not, in fact, know of the appropriate law, they are deemed to know it under the doctrine of constructive notice.

C. PROMISSORY ESTOPPEL

Government contract law differs from commercial contract law in the application of estoppel, an equitable doctrine which aims to prevent unfair or inequitable outcomes.

Promissory Estoppel prevents a party who has misled someone through words and actions, from denying responsibility for those representations. For example, a government contracting officer may have the *legal* right to terminate a contractor for default if the contractor does not deliver on time. But if the contracting officer encourages continued performance *after the delivery date has passed*, and the contractor expends additional time and expense attempting to complete the contract, the contracting officer may lose the right to terminate. Here, the government's actions encourage continued performance and impliedly suggest the contractor will be given additional time to complete. The courts might determine that the government has impliedly *promised* the contractor additional time and therefore *estop* the government from enforcing the termination for default clause. In contrast, the Government will not be bound by estoppel if the promise is one that the government agent has no authority to make. Thus, if an IRS agent incorrectly advises a taxpayer about the tax laws, the IRS is not estopped from demanding that the taxpayer pay the correct tax. To hold otherwise would allow government employees to over-ride the express intent of Congress. The government may be bound, however, by promises that are *within the authority of the agent*. For contracting officers, who possess great authority and discretion in the award and administration of contracts, promissory estoppel may indeed become a problem.

D. APPARENT AUTHORITY

The legal doctrine of apparent authority provides that a principal is *bound* not only by their agent's *actual authority*, but also by the authority their agent *appears* to have. Thus, a firm in the commercial marketplace may be bound when other parties reasonably rely on the appearance that its agent has authority to take certain actions. But the Federal Government is *never subject to the doctrine of apparent authority*. It is bound only by an agent's *actual* authority to take the action. The topic of "authority" is discussed extensively in the next chapter.

E. STATUTES AND REGULATIONS MANDATE CONTRACT PROCEDURES AND CLAUSES IMPLEMENTING FEDERAL GOVERNMENT POLICY

Unlike contracting in the private sector, the process by which contracts are formed is very rigorously structured, as are the contents of the contracts themselves. Laws such as the Competition in Contracting Act mandate that contracts be competed among "all responsible sources", unless a statutory exception can be documented. The Federal Acquisition Regulation (FAR) further details the competitive process by which the statutory mandate for competition may be satisfied. These laws and regulations greatly limit the latitude the Contracting Officer and the prospective contractor may exercise in negotiating a legally binding agreement. In contrast, private parties have great freedom to craft a contractual agreement, so long as the agreement is not illegal.

The FAR requires that clauses implementing government procurement policy be inserted in government contracts. Many of these so-called “mandatory clauses” would not be found in contracts between private parties. Examples include the Changes Clause, which grants the government a *unilateral right* to make changes to contract work; the Disputes clause, which requires that any dispute between the parties be first submitted to the Contracting Officer before seeking a judicial remedy; and the Termination for Convenience Clause which gives the government a unilateral right to end a contract and pay the contractor only for work performed, plus profit on that work. Other clauses may implement Federal environmental, labor and socio-economic policies that are ancillary to the main purpose of the contract. Those laws reflect Congress’ use of the government’s substantial economic weight in the marketplace to advance various socio-economic policies.

It is almost inconceivable that, in a contract between private parties, one party would ever be given the unilateral right to change the deal or cancel the contract. Yet, these are powers the government almost always reserves to it in the standard FAR clauses required in most government contracts.

F. IMPLIED-IN-LAW CONTRACTS

Another difference between private and Government contracts can be found in the area of implied contracts. Earlier reference was made to the distinction between an implied-in-fact contract and an implied-in-law contract. Generally, the Government is subject to the same rules concerning implied- in-fact contracts as a private party would be. Implied-in-law contracts (quasi-contracts) present a different situation, because they do not require that the parties assent to them. The courts have consistently declined to recognize a contract as binding upon the United States where the element of consent was wholly lacking and could not be reasonably implied from the facts and circumstances or from the acts of the Government’s representatives. Even in those instances where the Government has actually derived a benefit from the services of a private individual, the courts have refused to recognize an obligation on the part of the United States to pay if there is no evidence of consent on the part of the Government. In similar situations involving private contracts, the law would find that the private party had implicitly consented, on the theory that such a finding was necessary in order to avoid unjust enrichment.

F. ROLE OF THE CONTRACTING OFFICER

A final and fundamental difference between private sector and Government contracting is the role of the Government’s Contracting Officer in the award and administration of the contract. The Contracting Officer’s responsibilities extend beyond merely representing and protecting the interests of the Federal Government; the Contracting Officer also must “Ensure that contractors receive impartial, fair, and equitable treatment.” FAR 1-602-2(b). Given the disproportionate power the government has in dictating the terms of the contract and the execution of contract work, it is essential that the

Contracting Officer exercise these considerable powers *fairly* and *equitably*. Thus, the Contracting Officer must always balance the duty to get the best deal for the government against the obligation to act fairly with respect to the contractor.

IV. REVIEW

Before coming to the resident portion of the class, the student should have a basic understanding of the following terms:

contract

mutual assent

offer

acceptance

counter-offer

consideration

bilateral contracts

unilateral contracts

mutual mistake

unilateral mistake

sovereign immunity

promissory estoppel